

U.S. Department of Labor

Board of Contract Appeals  
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In the Matter of

CARTER PIERCE MECHANICAL SERVICES, INC.  
Appellant

Contract No. 99-0-4871-14-037-01  
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Dated: June 24, 1997

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Case No. 91-BCA-1

Carter Pierce, pro se  
For the Appellant

Frank P. Buckley, Esq.  
For the Contracting Officer

BEFORE: MILLER, LEVIN, AND VITTON  
Miller, Member, Board of Contract Appeals

**DECISION AND ORDER**

On November 23, 1990, John Steenberg, a United States Department of Labor ("Department") Contracting Officer, issued a final decision denying Carter Pierce Mechanical Services Inc.'s ("Appellant") request for a change order to Contract No. 99-0-4871-14-037-01 in the amount of \$52,710.00. The request was originally submitted on July 8, 1990, and later revised on August 29, 1990. On January 8, 1991, this Board received and docketed Appellant's amended claim, dated November 15, 1990 and addressed to Steenberg, in the reduced amount of \$33,869.01 plus interest.

During a telephone prehearing conference on April 1, 1992, counsel for the Contracting Officer stated that the Contracting Officer never issued a final decision on Appellant's November 15, 1990, claim. To avoid a potential jurisdictional issue, the Contracting Officer agreed to file a letter indicating that his final written decision from which the appeal was taken should be deemed to cover both the initial and subsequent formulations of Appellant's claim and should be construed to be a denial of both formulations of Appellant's claim. On April 30, 1992, this Board received the Contracting Officer's letter, dated April 16, 1992, which stated that the November 15, 1990, amended claim was denied, because the basis for the November 15, 1990, claim was the same as the previously denied July 8, 1990, claim.

During a second telephone prehearing conference on December 17, 1992, the Contracting Officer moved to dismiss this case for Appellant's failure to prosecute its appeal and comply with the orders of this Board. Appellant was given one week to comply with the Board's orders, and a ruling on the Contracting Officer's motion to dismiss was deferred. Because Appellant subsequently complied with the Board's orders, the Board denies the Contracting Officer's motion to dismiss as moot. This case is decided upon the written record, with the consent of the parties.

### **Findings of Fact**

1. On or about April 19, 1990, Appellant submitted a bid for the "[r]emoval of existing and installation of new roof-mounted package HVAC [heating, ventilation and air conditioning] units" in eighteen buildings at the Sacramento, California, Job Corps Center ("Center"). Appellant's bid was in the amount of \$330,128.56, and included \$80,538.00 for labor and \$3,400.00 for the rental of a helicopter to lift the HVAC units onto the buildings' roofs. Appellant intended to replace all of the HVAC units at one time, using the helicopter to lift the new HVAC units onto the roofs and to remove the old HVAC units. (AF I 58, 77, 99; AF II 01010-1; Contracting Officer's Brief, Exh. 1.)<sup>1</sup>

2. The contract was awarded to Appellant as the low bidder on May 24, 1990. Clause 52.212-3 of the contract required performance to begin within 14 days of a notice to proceed and to be completed within 168 days. The notice to proceed was issued on June 19, 1990; consequently, completion was required by December 4, 1990. The commencement and completion of contract performance were timely.<sup>2</sup> (AF I 145, 166; AF II IV.3.)

3. The contract documents include the Standard Clauses, Additional Instructions to Bidders, Supplemental Conditions, Labor Standards Provision, Equal Employment Clauses, drawings, and the Specifications prepared by John Turley & Associates<sup>3</sup>, dated March 14, 1990, labeled "HVAC Equipment Replacement, Sacramento Job Corps Center." (AF I 156.)

4. The contract's Standard Clauses included clause 52.243-4 Changes (Aug 1987), and clause 52-243-7 Notification of Changes (Apr 1984). (AF II IV.23-IV.24.)

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<sup>1</sup>"AF I" are references to pages in the Appeal File compiled and submitted to the Board by the Contracting Officer. "AF II" references are to pages in the contract's Project Manual.

<sup>2</sup>A Certificate of Substantial Completion was issued on October 2, 1990, and the contract was closed-out on December 4, 1990. (AF I 145-46.)

<sup>3</sup>John Turley & Associates is also referred to as Turley, Provencal & Associates, and is the design architect/engineer assigned to the contract..

5. The contract left the specific manner of replacing the HVAC units to the Contractor, never incorporating a specific schedule for the removal and installation of the HVAC units.<sup>4</sup> However, the contract required the work to be performed “in a manner that will not interfere with the conduct of normal business” of the Center. (AF I 77, 222; AF II V.1.) The contract required that the contractor coordinate with the Center all work that would interfere with the normal operations of the Center. (AF II V.2.)

6. A preconstruction meeting was held on June 27, 1990. Appellant, John Turley of Turley, Provencal & Associates, Jim Rodgers of DMJM/HTB<sup>5</sup>, and representatives from the Center<sup>6</sup> were present. At the meeting, the Center requested that the “HVAC units be replaced one at a time so no building is completely without cooling” during the hot summer months. This request was not included on a list of Center-requested change orders in a July 5, 1990, summary of the preconstruction meeting prepared by Turley and sent to Al Stith, Government Authorized Representative.<sup>7</sup> (AF I 266-68; Affidavit of James Rodgers; see climatological data attached to Contracting Officer’s pre-hearing statement.)

7. The Pre-Construction Conference Text provided the following instructions to Appellant regarding correspondence procedures:

Weekly and monthly construction schedule updates, as applicable, requests for information and clarifications, all shop drawings and samples, and responses to bulletins, field orders or change request proposals should be sent directly to the Design Architect/Engineer with copies to the [Government Authorized Representative]. . . . All disputes and claims should be addressed directly to the Contracting Officer who signed the contract, with a copy immediately forwarded to the attention of the [Government Authorized Representative] and Design Architect/Engineer.

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<sup>4</sup>Although the March 2, 1990, Commerce Business Daily notice of the contract, and a Scope of Work for this project, bearing the date June 1986, make references to the phased installation of the HVAC units, these documents were not made a part of the contract. The June 1986, Scope of Work was apparently superseded by the March 14, 1990, Project Manual for this contract. (AF I 77, 94, 157-63.)

<sup>5</sup>DMJM/HTB is a real estate and construction management consulting firm, which has a contract with the U.S. Department of Labor to provide advice and services in connection with the development and management of construction projects for Job Corps Centers throughout the country. (Affidavit of Michael O’Malley; Affidavit of James Rodgers.)

<sup>6</sup>The Center is also referred to as the owner or the user.

<sup>7</sup>Stith is designated as the Government Authorized Representative in the Pre-Construction Conference Text. (AF I 166.)

(AF I 169.)

8. In the weekly status report of July 7, 1990, Turley informed Stith that:

An extended discussion ensued regarding procedure of work on each building. Carter Pierce indicated he could no justification [sic] for him to be burdened with a one-at-a-time removal of the HVAC units. He did not bid the job with this restrictive schedule and so will request a change order if required to proceed in this manner. User reiterates his requirement for a one at a time replacement. Mr. Jim Ro[d]gers was contacted by phone by Wylie D. Jennings [Center Director] in regards to this matter and asked for an opinion regarding [D]epartment of Labor probable decision of this requested contract change. Mr. Ro[d]gers indicated a favorable decision could be expected. On the strength of this phone call Carter Pierce indicates he will proceed as directed expecting his request for a change order to increase contract price to be approved.

(AF I 262; Affidavit of James Rodgers.)

9. Appellant submitted to Stith a request for a change order, dated July 8, 1990, in the amount of \$51,826.00 for the replacement of HVAC units on a one-by-one basis.<sup>8</sup> DMJM/HTB received Appellant's request on August 13, 1990. Appellant estimated that the work would take an additional 60 days to complete.<sup>9</sup> (AF I 90-92.) On August 29, 1990, Appellant submitted a revised proposal in the amount of \$52,710.00. Appellant's proposal included \$28,517.00 for additional labor, and \$13,005.00 for the rental of a crane to lift the HVAC units onto the buildings' roofs, instead of a helicopter as originally planned. Appellant's proposed crane rental costs included a \$3,400.00 credit for the cost of helicopter. DMJM/HTB forwarded the revised proposal to Steenberg on September 7, 1990. (AF I 64, 71-73.)

10. By letter dated July 12, 1990, Turley sent to Stith a list of proposed change orders requested by the Center. The list included, as item #4, the replacement of the HVAC units on a one-by-one basis. The Center viewed the phased replacement of the HVAC units as "an absolute necessity." Turley urged the Department's "immediate attention to these requested items especially item #4. The contractor is generating additional costs on a daily basis complying with this users requests on this item. He needs some indication that this will be approved or he will revert to his

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<sup>8</sup>The amount of the July 8, 1990 proposal contained in the Appeal File is different from the amount of the July 8, 1990 proposal submitted by Appellant with his Statement of Facts and argument. Because the proposal was subsequently revised, we need not resolve this discrepancy.

<sup>9</sup>Although Appellant requested a 60-day extension of the performance period, the time extension was unnecessary. Appellant completed the project within the original 168-day performance period. (AF I 78, 85-86, 145-6.)

original schedule of removal figured in his bid.” Steenbergen was sent a copy of this letter. (AF I 67-69, 87-89, 257-60.)

11. According to the weekly status report of July 31, 1990, prepared by Tim Moon of Turley, Provencal & Associates and sent to Stith, Rodgers told Appellant that “[a]pparently, money is only available to fund change order item #4 (Replace HVAC units one at a time).” (AF 255.)

12. On August 27, 1990, Michael O’Malley of DMJM/HTB phoned Moon to discuss Appellant’s request for a change order for the one-by-one replacement of the HVAC units. Moon indicated that neither he nor Rodgers authorized Appellant to proceed with the one-by-one replacement of the HVAC units. Rodgers only indicated “that he could probably recommend for approval any such request but that the Contracting Officer had the final word.” (AF I 128; Affidavit of Michael O’Malley.)

13. Also on August 27, 1990, O’Malley telephoned Appellant. Appellant indicated that the HVAC replacement was 90% complete. Appellant also stated that Rodgers never told Appellant to proceed with the one-by-one HVAC replacement, but indicated that the modification could be recommended for approval. Appellant admitted that “he basically was taking a risk.” (AF I 127; Affidavit of Michael O’Malley.)

14. Section h of the Disputes clause required Appellant to “proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.” (AF II IV.19.)

15. By letter dated August 27, 1990, the Contracting Officer requested additional information in support of Appellant’s July 8, 1990, claim, including a written confirmation of the helicopter price quotation, three outside schedules of rates supporting the crane rental per hour cost and minimum charges, invoice documentation supporting that the crane rental per hour cost and minimum charges are “standard” rates charged to other clients, original bid estimate documentation to assist in the documentation of the additional hours claimed for replacement of the HVAC units on a one-by-one basis, and an itemized breakdown of overhead costs incurred. The Contracting Officer reiterated this request in an undated letter which was faxed to Appellant on October 19, 1990, two weeks after Appellant had achieved substantial completion. (AF I 79-82.)

16. In response to the Contracting Officer’s request for supporting documentation, Appellant submitted a written confirmation of the helicopter price quotation, price schedules from two crane companies, a breakdown of labor overburden rates, certified payroll records, and the following certification:

I Carter Pierce do hereby certify that the equipment used for lifting the air conditioning units to the roof tops has been continually on this jobsite starting June 26, 1990 untill [sic] Sept. 25, 1990. Also that the rate for this equipment to others

is [\$]85.00 per hour with a four hour minimum with a move on and move off fee of \$125.00 per jobsite.

(AF I 83-105, 134-44.) Although the second request for information was made over two weeks after Appellant had achieved substantial completion, and almost one month after Appellant had returned the crane to the rental company, Appellant did not submit any documentation, such as invoices or canceled checks, in support of his crane rental costs. Appellant has also failed to provide documentation of its increased labor costs.<sup>10</sup> Appellant has not provided any explanation for failing to submit such documentation.

17. During the September 4, 1990 weekly status meeting, Moon informed Appellant that, according to O'Malley, there was a possibility that Appellant's request for a change order would be denied. (AF I 243.)

18. During the September 11, 1990 weekly status meeting, Appellant indicated that he had spoken with Steenbergen, and that Steenbergen indicated that a letter of approval for the one-by-one replacement of the HVAC units would be forthcoming. (AF I 241.) Steenbergen denies making any representation that he would approve Appellant's request for a change order for the one-by-one replacement of HVAC units. (Affidavit of John Steenbergen.)

19. In an undated memorandum, Stanley A. Burger, Chief of the Department's Division of Administrative Services, recommended that Steenbergen negotiate an equitable adjustment with Appellant in consideration for Appellant's compliance with the Center's request to replace the HVAC units on a one-by-one basis. (AF I 86.)

20. By memorandum dated November 6, 1990, Burger, with the concurrence of the DMJM/HTB representatives, recommended that Steenbergen deny Appellant's request for a change order because the alleged change was not authorized by Steenbergen, and did not require an extension of the performance period. According to Burger, the Center's request did not prevent Appellant from lifting the HVAC units onto the roofs all at once as originally planned and then installing them on a one by one basis. (AF I 77-78, 85-86, 106.)

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<sup>10</sup>Bonita Beaudoin of DMJM/HTB prepared an analysis, based on Appellant's certified payroll records, of the actual labor hours expended by Appellant in comparison to the labor hours originally bid by Appellant. According to Beaudoin's analysis, Appellant did not incur additional labor costs as a result of the change because Appellant's total labor costs were less than Appellant's estimated labor costs in its original bid. (AF I 58, 107-22, 134-44; Affidavit of Bonita Beaudoin.) We reject this analysis. Under the Changes clause of the contract, a contractor is entitled to an equitable adjustment if the contractor experiences an increase in costs on any part of the contract as a result of a change, not the contract as a whole. Under a fixed price contract, the Government is not entitled to use any efficiencies achieved by the contractor to offset the Government's liability for increased costs attributable to a change.

21. Appellant, in its submissions to the Board, indicates that the alleged change was authorized by Rodgers and Jennings, and that the roofs of the several buildings on which Appellant was working would not support the weight of the HVAC units if they were lifted onto the roofs at one time. Appellant never informed the Department, the Center, DMJM/HTB, or Turley, Provencal & Associates that the roofs could not support the weight of the HVAC units if placed on the roofs at the same time. There is no evidence which supports Appellant's allegation that the roofs could not support the weight of the HVAC units, or that the roofs would otherwise be damaged if the HVAC units were lifted onto the roofs at the same time.

22. By letter dated November 15, 1990 and addressed to Steenbergen, Appellant reduced the amount of its claim. The revised claim seeks an equitable adjustment in the amount of \$33,869.01, including \$13,005.00 for additional crane rental costs, and \$11,724.02 for additional labor, as well as compensation for a performance bond, overhead, and profit, all based on percentages of the crane and labor costs. (AF I 5-6.)

23. By letter dated November 23, 1990, the Contracting Officer denied Appellant's July 8, 1990, request for a change order, as amended on August 29, 1990. The Contracting Officer asserted that the alleged change was unauthorized, and that Appellant did not substantiate the costs incurred as a result of the change. (AF I 7.) By letter dated April 16, 1992, and received by this Board on April 30, 1993, the Contracting Officer denied the November 15, 1990 formulation of Appellant's claim, for the reasons stated in his November 23, 1990 decision.

### **Discussion**

In its November 15, 1990 claim, Appellant asserted entitlement to an equitable adjustment under the differing site conditions clause of the contract.<sup>11</sup> In its Statement of Facts and argument, received by this Board on December 30, 1992, Appellant cited the contract's changes clause, not the differing site conditions clause, as a basis for its claim. It is clear from the facts of this case that Appellant is asserting entitlement under the contract's changes clause, and we will decide this appeal on that basis. Appellant has the burden of proving that there was a change to the contract, and that Appellant incurred additional costs as a result of that change. See Amis Construction & Consulting Serv., Inc., LBCA 81-BCA-4, 82-1 BCA ¶ 15,679.

A constructive change will be found where an authorized Government representative rejects a contractor's proposed method of performance which was permitted by the terms of the contract. Warren Oliver Co., VABCA Nos. 1657, 1807, 87-3 BCA ¶ 19,997, citing J.B. Williams Co. v. United States, 196 Ct.Cl. 491, 450 F.2d 1379 (1971). Appellant proposed to replace all of the HVAC units at the same time. Nothing in the contract documents stated that the HVAC units must be replaced

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<sup>11</sup>While Appellant's unsupported assertion that the roofs would not support the weight of the HVAC units if the HVAC units were installed on a phased schedule may be a colorable differing site condition claim, Appellant provided no evidence in support of such a claim. We need not consider the issue further.

on a specific schedule or on a one-at-a-time basis. The contract documents did not prohibit a mass replacement method of performance. Appellant's proposed method of performance was permitted by the contract documents.

The Contracting Officer argues in his brief on appeal that the provision in the contract documents requiring the contractor to perform the contract in a manner which will not interfere with the operations of the Center are inconsistent with Appellant's mass replacement strategy. Based on the record before us, we can find no such inconsistency. The contract documents do not specifically prohibit a mass replacement strategy. There also is no evidence that the Contracting Officer, prior to this appeal, believed that the mass replacement strategy and the contract provision were inconsistent, and the Contracting Officer did not deny Appellant's claim based on an inconsistency between the proposed method of performance and the contract. The contract documents state that any contractor operations which do interfere with Center operations should be coordinated with the Center. Because of the Center's insistence on a phased installation schedule, Appellant and the Center did not have the opportunity to explore other options and negotiate a mutually agreeable installation schedule. As the contract documents allowed for coordination between Appellant and the Center, we find no inconsistency between the contract documents and Appellant's proposed method of performance.<sup>12</sup> Furthermore, Appellant was required by the Disputes clause to continue performance pending the issuance of a change order, and if Appellant proceeded with its original mass replacement strategy, it risked violating the terms of the contract by interfering with the normal operations of the Center.

To find a constructive change, we must find that an authorized Government representative ordered Appellant to replace the HVAC units on a one-by-one basis. See PJ Dick, Inc., GSBCA No. 12033, 95-2 BCA ¶ 27,739. Jennings, the Center Director, requested that the HVAC units be replaced on a one-by-one basis. Appellant responded that he would incur additional costs in complying with the Center's request, and an adjustment to the contract price would be necessary if required to proceed as requested by the Center. Jennings then "reiterate[d] his requirement for a one at a time replacement." Jennings phoned Rodgers at DMJM/HTB to determine the probable response of the Department to a request for an equitable adjustment. Rodgers stated that if the request was properly documented, it would probably be approved. As a result of Jennings's request and the assurances from Rodgers that a "favorable decision could be expected" on a request for a change

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<sup>12</sup>The Contracting Officer also asserts that Appellant, by failing to attend a pre-bid walk-through of the Center, did not avail itself of an opportunity to become aware of conditions at the Center. While this argument might be relevant to the previously rejected differing site condition claim, it is irrelevant to Appellant's claim under the Changes clause. Attendance at a pre-bid walk-through is not mandatory. Furthermore, there is no evidence that prospective bidders were informed during the pre-bid walk-through that the Center would require a phased installation schedule. Any directions or instructions regarding a phased installation schedule for the HVAC units given at the pre-bid walk-through should have been provided in the form of an addendum to all contractors who had a copy of the Solicitation. There is no evidence that an addendum was issued in this instance.



order for the one-by-one replacement of the HVAC units, Appellant agreed to proceed with the replacement of the HVAC units on a one-by-one basis, pending the submission and approval of a contract modification. Under these circumstances, we find that Jennings directed Appellant to replace the HVAC units on a one-by-one basis. We further find that the directive was reasonable under the circumstances of this case.

Although Jennings did not have the authority to order changes to the contract, we find that Jennings' directive was ratified by Steenbergen. Ratification will be found where an authorized "government official has actual or constructive knowledge of a representative's unauthorized act and expressly or impliedly adopts the act." Parking Company of America, Inc., GSBCA No. 7654, 87-2 BCA ¶ 19,823, citing Williams v. United States, 130 Ct.Cl. 435, 127 F.Supp. 617, cert denied 349 U.S. 938 (1955), W. Southard Jones, Inc., ASBCA No. 6321, 61-2 BCA ¶ 3192. The silence or inaction of an authorized government official may constitute ratification. Williams, supra.

As of receipt of Turley's July 12, 1990 letter listing proposed changes requested by the Center, Steenbergen knew, constructively, if not actually, that Appellant had commenced replacing the HVAC units on a one-by-one basis in compliance with the Center's directive, that Appellant was allegedly incurring additional costs in complying with the Center's directive, and that a change order was being requested. Steenbergen never informed Appellant that its performance was unauthorized, nor did Steenbergen order Appellant to discontinue performance pending the issuance of a change order. Steenbergen cannot now claim that Appellant's compliance with the Center's directive was unauthorized when he failed to act on the knowledge that Appellant was complying with the Center's directive with the expectation that Steenbergen would issue a change order. For these reasons, we find that Steenbergen ratified Jennings' directive to replace the HVAC units on a one-by-one basis.

Appellant provided proper notice of the constructive change. The Pre-Construction Conference Text instructed Appellant to contact Stith, DMJM/HTB and Turley, Provencal & Associates regarding daily matters of contract administration, including requests for change orders. Appellant was only to communicate with Steenbergen for claims and disputes. The Center's directive was given on June 26, 1990, and Appellant informed Turley and Rodgers that it considered the directive to be a constructive change no later than July 7, 1990. Appellant submitted its request for a change order to Stith on July 8, 1990, well within the 20 calendar days for notification of changes stated in clause 52.243-7 of the contract. We find that Appellant fully complied with the notification provisions of the contract, and that the contract was constructively changed to require the replacement of the HVAC units on a phased schedule. See Midwest Environmental Control, Inc., LBCA No. 93-BCA-12, \_\_\_BCA ¶ \_\_\_\_.

To be entitled to an equitable adjustment for a constructive change, Appellant must prove that it incurred additional time or costs. The contract's changes clause states "[i]f any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing." Federal Acquisition Regulation 52.243-4. It is undisputed that Appellant did not incur additional time

in performing the contract. Although Appellant requested an additional 60 days to complete the changed contract work in its proposal, Appellant has neither alleged nor provided any evidence that it incurred additional time in performing the changed work.

Appellant seeks reimbursement for additional labor expenses and crane rental expenses. Appellant also seeks the costs of a performance bond, overhead, and profit, all based on percentages of the labor and crane expenses. We find that Appellant has not proved that it incurred additional costs in performing this contract.

Appellant has not substantiated its claim for the crane rental costs. Appellant submitted a certification by its principal, Carter Pierce, of the length of time the crane was on the work site, and the hourly rate and fees generally charged for the crane rental, but has not submitted any evidence, such as invoices or canceled checks, of the actual costs incurred for the crane rental. In the absence of such evidence, we cannot find that Appellant is entitled to an equitable adjustment for those costs. See Tibbetts Mechanical Contractors, EBCA No. 433-11-89, 90-3 BCA ¶ 23,055.

Appellant has similarly failed to prove that it incurred additional labor costs. While Appellant alleges additional labor costs of 11 hours per unit at \$23.17 per hour, Appellant has adduced no documentary evidence in support of this claim, and has failed to provide any explanation or estimation methodology supporting the assertion that the change entailed labor costs reasonably approximating the amounts claimed. In the absence of such evidence, Appellant has failed to prove its claim and is not entitled to an equitable adjustment for those costs. Because the alleged costs of a performance bond, overhead, and profit were based on percentages of additional costs which were not proved, Appellant is not entitled to an equitable adjustment for those costs.

### **ORDER**

Appellant's claim is DENIED.

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Edward Terhune Miller  
Member, Board of Contract Appeals

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Stuart A. Levin  
Member, Board of Contract Appeals

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John M. Vittone  
Chair, Board of Contract Appeals